IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.712 OF 2005

Dinesh C. Patel ... Petitioner
(Orig.Accused No.4)

V/s

Pluto Plastics Pvt.Ltd. & Anr. ... Respondents

Shri A.S. Khandeparkar i/b B. Amin & Co.for petitioner
Shri Prakash More for respondent No.1
Shri A.S. Shitole, APP for the State.

Coram : V.M. Kanade, J.
Dated : 12/04/2005.

P.C. :-

1 I have heard the learned counsel appearing for the petitioners,respondent No.1 and APP for the State.

2 The petitioner is challenging the order of issuance of process passed by the Metropolitan Magistrate,8th Court, Esplanade, Mumbai on the complaint filed under section 138 of the Negotiable Instruments Act. It is submitted by the learned counsel for the petitioner that the petitioner was only the advisory director of the company and, therefore, he was not connected to in charge or responsibility of affairs of the company.

3 He has relied upon the judgment of the **Madras High Court in the case of S.N. Bangur & Ors. v. M/s Klen & Marshalls Mrfs. And Exporters Pvt.Ltd**. Reported in **2002 CRI L.J. 4155.** He has invited my attention to paragraph No.17

of the said judgment. Paragraph No.17 reads as under.

"The wordings contained in Section 141(1) of the Act are slightly different from the wordings contained in Section 141(2) of the Act with reference to the presumption. It is mentioned under Section 141(1) of the Act that when a company has committed the offence, every person, who was in charge and responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty. But under Section 141(2) of the Act, the presumption would arise against the director manager etc. only when it is proved that the offence has been committed with the consent or connivance of or is attributable to, any neglect on the part of those person. Therefore, mere words that the petitioners-directors are responsible for the failure to make the payment of the cheque amounts without any further material would not be sufficient to conclude that it would cover Section 141(2) of the Act".

4 In my view the said submission made by the learned counsel appearing for the petitioner cannot be accepted. From perusal of the complaint it can be seen that specific averments are made in paragraph No.2 stating therein that the accused-petitioner was the director of the accused No.1 company and was in charge and responsible for the day to day affairs of the accused No.1. Further, particulars are mentioned in paragraphs No.3 and 4 as to what steps have been taken by the accused in respect of transaction in question. Further , on page-92 of the petition, the

petitioner has annexed form 32(Exhibit-'F”) wherein it s mentioned that the petitioner had resigned as Director on 15/10/2004. In this case, the cheques in question were issued on 16/12/2002. Thus, on the date on which the cheques were issued, the petitioner was very much the director of the company.Reliance which is placed on paragraph-17, a ratio of the judgment in the case of **S.N. Bangur & Ors. v. M/s Klen & Marshalls Mrfs. And Exporters Pvt.Ltd**. in my view is not applicable to the facts of the present case. The case of the respondents is that the petitioner was in charge and responsible for the affairs of the company and was liable under section 141(1) of the Act. Paragraph-17 of the said judgment on which reliance has been placed takes into consideration the allegation which is made under section 141(2) of the said Act and, therefore, this ratio is not applicable to the facts of the present case.

5 So far as the second submission of the learned counsel appearing for the petitioner is concerned, it is contended that the goods supplied and delivered are lying in the premises of the accused No.l and that the company had asked the complainant to take the goods back by letter dated 10/7/2004. It was stated that the goods which were supplied are in original intact condition and that the company was willing to pay an amount of Rs.81,144.24 as full and final settlement.The learned counsel for the petitioner has taken me to the correspondence between the parties and also the terms and conditions of the contract.

7 It is submitted on behalf of the petitioner that the company was not liable to pay the said amount. It is not possible to accept the said submission made by the learned counsel for the petitioner. The question whether the liability and debt or the existing liability as envisaged under section 138 of the Negotiable Instruments Act exist or not is a pure question of fact and it is to be decided by the trial court after the evidence is adduced by both parties.Under section 139 of Negotiable Instruments Act, presumption is raised that drawer of the chequess is liable to pay an amount and it is for him to rebut the said presumption. This can only be done during the trial. Thus, there is no merit in the submission made by the learned counsel for the petitioner. Criminal writ petition is liable to be dismissed.

It is however clarified that the questions raised in this petition are kept open.The trial court shall decide these questions after the evidence is adduced by both parties on merits and in accordance with law.The trial court shall not be influenced by the observations made in this order.

The petitioner, however, is exempted from appearing in the trial court. His plea also be recorded through his advocate and only if the presence of the petitioner is necessary, the Magistrate may direct the petitioner to remain present for the purpose of recording the statement under section 313.

Parties to act on authenticated copy issued by the

Registry.

(V.M. Kanade,J.)